

CARLSMITH BALL LLP

IAN L. SANDISON 5597
JOHN P. MANAUT 3989
LINDSAY N. McANEELEY 8810
ASB Tower, Suite 2100
1001 Bishop Street
Honolulu, HI 96813
Tel No. 808.523.2500
Fax No. 808.523.0842
isandison@carlsmith.com
JPM@carlsmith.com
lmcaneely@carlsmith.com

Attorneys for Applicant
UNIVERSITY OF HAWAI'I AT HILO

WATANABE ING LLP
A Limited Liability Law Partnership

J. DOUGLAS ING 1538-0
BRIAN A. KANG 6495-0
ROSS T. SHINYAMA 8830-0
First Hawaiian Center
999 Bishop Street, Suite 1250
Honolulu, HI 96813
Telephone No.: (808) 544-8300
Facsimile No.: (808) 544-8399
DougIng@wik.com
BKang@wik.com
rshinyama@wik.com

Attorneys for
TMT INTERNATIONAL OBSERVATORY, LLC

BOARD OF LAND AND NATURAL RESOURCES

STATE OF HAWAI'I

IN THE MATTER OF

Contested Case Hearing Re Conservation
District Use Application (CDUA) HA-3568 for
the Thirty Meter Telescope at the Mauna Kea
Science Reserve, Ka'ōhe Mauka, Hāmakua,
Hawai'i, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

THE UNIVERSITY OF HAWAI'I AT
HILO AND TMT INTERNATIONAL
OBSERVATORY, LLC'S JOINT
RESPONSE TO HARRY
FERGERSTROM'S PROPOSED
FINDINGS OF FACT, CONCLUSIONS

2011 JUN 13 P 1-5b
DEPT OF LAND & NATURAL RESOURCES
STATE OF HAWAII
OFFICE OF CONSERVATION
AND COASTAL LANDS

**THE UNIVERSITY OF HAWAI'I AT HILO AND TMT INTERNATIONAL
OBSERVATORY, LLC'S JOINT RESPONSE TO HARRY FERGERSTROM'S
PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, RECOMMENDATION,
FILED MAY 30, 2017 [DOC. 662]**

Applicant UNIVERSITY OF HAWAI'I AT HILO ("UH Hilo) and TMT INTERNATIONAL OBSERVATORY, LLC ("TIO"), through their respective counsel, hereby jointly submit this Response to Harry Fergerstrom's Proposed *Findings of Fact, Conclusions of Law, Recommendation*, filed May 30, 2017 [Doc. 662] ("Response").

I. STANDARD OF REVIEW FOR REVERSAL OR MODIFICATION OF ADMINISTRATIVE FINDINGS, CONCLUSIONS, DECISIONS, OR ORDERS

To prevent judicial reversal or modification of administrative findings of fact under § 91-14(g), Hawaii Revised Statutes ("HRS"), the Board of Land and Natural Resources ("BLNR") should, upon review of the record, reverse or modify findings that are "[c]learly erroneous in view of the reliable, probative, and substantial evidence on the whole record." *In re Gray Line Hawaii Ltd.*, 93 Hawai'i 45, 53, 995 P.2d 776, 784 (2000). A finding of fact is clearly erroneous when: (1) the record lacks substantial evidence to support the finding or determination; or (2) despite substantial evidence to support the finding or determination, the BLNR is left with the definite and firm conviction that a mistake has been made. *Kienker v. Bauer*, 110 Hawai'i 97, 105, 129 P.3d 1125, 1133 (2006).

Similarly, conclusions of law should be reversed or modified where the BLNR finds they are in violation of constitutional or statutory provisions, in excess of the statutory authority or jurisdiction of the Commission, or affected by other error of law. *Id.*

II. DISCUSSION

A. Responses to Harry Fergerstrom's ("Fergerstrom") Proposed FOF and COL

The UH Hilo and TIO object to each of the FOF and COL in Fergerstrom's Proposed Findings of Fact, Conclusions of Law and Decision and Order ("Fergerstrom's Proposed FOF/COL") to the extent that they are irrelevant, inapplicable, immaterial, mischaracterize the evidence, misstate or misrepresent the record, rely on evidence that is not credible, biased, or incomplete, and/or not supported by the evidence. UH Hilo and TIO also object to Fergerstrom's Proposed FOF/COL to the extent they assert alleged "findings" that are beyond the scope of issues set forth in Minute Order No. 19.

Appendix A contains general objections to the Fergerstrom's Proposed FOF/COL, which UH Hilo and TIO hereby incorporate by reference to its response to each of Fergerstrom's FOF and COL, to the extent applicable.

In addition to the general objections in Appendix A, UH Hilo and TIO have prepared a table of specific responses and objections to Fergerstrom's Proposed FOF/COL, which is attached hereto as Appendix B. Citations to the evidence in the record provided herein are not intended to be exhaustive or comprehensive, but demonstrate evidentiary support for UH Hilo and TIO's responses and objections.

UH Hilo and TIO further object to Fergerstrom's Proposed FOF/COL to the extent they seek to challenge the FEIS for the TMT Project. This proceeding is not an EIS challenge under HRS Chapter 343; Fergerstrom's ability to make such a challenged expired long ago, and she cannot reopen the FEIS approval process through improper arguments of insufficiency under the statute and rules governing the EIS process. This proceeding is entirely governed by the applicable constitutional law and the Conservation District rules that are genuinely at issue here.

The FOF/COL and page numbers referenced herein are as provided in Fergerstrom's

Proposed FOF/COL. References to the UH Hilo and TIO’s Joint [Proposed] Findings of Fact, Conclusions of Law, and Decision and Order on May 30, 2017 [Doc. 671] (“**UH-TIO FOF/COL**”) are denoted by the prefixes “UH-TIO FOF” and “UH-TIO COL” for the numbered FOF and COL, respectively, in the UH-TIO FOF/COL.

Acronyms and defined terms used herein are defined in the Index of Select Defined Terms, which was filed as part of the jointly-submitted UH-TIO FOF/COL.

Any specific proposed finding or conclusion not specifically referred to or addressed below is deemed denied and disputed.

B. Responses to Fergerstrom’s Proposed Decision and Order

Fergerstrom’s proposed Decision and Order is not supported by the record. As set forth in the UH-TIO FOF/COL, substantial evidence has been adduced to show that the CDUA satisfies the eight criteria as set forth in Hawai‘i Administrative Rule (“**HAR**”) § 13-5-30(c)(1). The record also shows that the TMT Project is consistent with the UH Hilo’s and the BLNR’s obligations under the public trust doctrine, *Ka Pa ‘akai*, and Article XI, section I and Article XII, section 7 of the Hawai‘i Constitution.

Ultimately, Fergerstrom is categorically opposed to the construction of TMT regardless of whether or not the TMT Project satisfies the eight criteria. No location on the mountain, and no combination of mitigation measures, will make the TMT Project acceptable to Fergerstrom. That position is not supported by the law.

III. CONCLUSION

For the reasons set forth herein and in the UH Hilo Pre-Hearing Statement, TIO’s Pre-Hearing Statement, the UH-TIO FOF/COL, the testimony of the UH Hilo’s and TIO’s witnesses, the examination of the Petitioners’ and Opposing Intervenor’s witnesses, and in UH Hilo’s and TIO’s other filings, UH Hilo and TIO respectfully jointly request that the Hearing Officer adopt

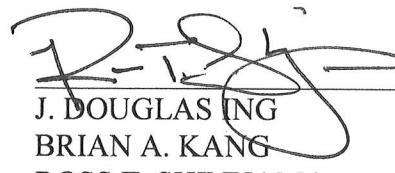
the UH-TIO FOF/COL, and reject Fergerstrom's Proposed FOF/COL.

DATED: Honolulu, Hawai'i, June 13, 2017.



IAN L. SANDISON
JOHN P. MANAUT
LINDSAY N. MCANEELEY

Attorneys for Applicant
UNIVERSITY OF HAWAII AT HILO



J. DOUGLAS ING
BRIAN A. KANG
ROSS T. SHINYAMA

Attorneys for
TMT INTERNATIONAL OBSERVATORY

Appendix A

General Responses to Petitioners'/Opposing Intervenors' Proposed Findings of Fact ("FOF") and Conclusions of Law ("COL")	
Citation does not support the proposition.	The citation offered by Petitioners/Opposing Intervenors does not support the proposed FOF or COL.
Estoppel/Improper Reconsideration	The proposed FOF or COL or a portion thereof is improper to the extent it is barred by estoppel or waiver, or improperly seeks reconsideration of the Hearing Officer's or the BLNR's prior ruling,
Inaccurate/False	The proposed FOF or COL or a portion thereof is inaccurate or false.
Incomplete.	The proposed FOF or COL is materially incomplete.
Irrelevant/Inapplicable.	The information in the proposed FOF or COL is irrelevant or inapplicable in this contested case proceeding. <u>See</u> Minute Order No. 19 [Doc. No. 281].
Lack of Jurisdiction	The proposed FOF or COL exceeds the scope of the Hearing Officer's jurisdiction and/or delegated authority
Mischaracterization.	The proposed FOF or COL mischaracterizes legal authority or the contents of the record.
Misleading. Partial quotation.	The proposed FOF or COL contains a partial quote from legal authority or a document in the record, and the incompleteness of the quotation is likely to mislead the reader.
Misleading. Presented out of context.	The proposed FOF or COL presents law or information in the record out of context and/or in a way that is likely to mislead the reader.
Misrepresentation	The proposed FOF or COL affirmatively misrepresents legal authority or the contents of the record.
Not credible.	The proposed FOF or COL is not credible based on the totality of the evidence contained in the record and/or the demonstrated biases of the witness whose testimony is cited in support of the proposed FOF or COL.

Not in dispute.	Either (1) the proposed FOF or COL is not at issue in this proceeding, or (2) standing alone, the proposed FOF or COL is not objectionable. The designation of any individual proposed FOF or COL as “not in dispute” does not and should not be construed as an admission of said FOF or COL or a concession that said FOF or COL should be incorporated into the final FOFs and COLs. It also does not and should not be construed as assent to any inferences suggested or that may be suggested by Petitioners/Opposing Intervenors from, e.g., their misleading grouping or ordering of otherwise unrelated facts.
Not in evidence.	The proposed FOF or COL asserts “facts” and/or cites documents that are not in evidence.
Unsupported/Unsubstantiated	The proposed FOF or COL is not supported by information in the record or was not substantiated by the Petitioners/Opposing Intervenors through the contested case process.

Appendix B

Summary Table of Responses to Fergerstrom's Proposed FOF/COL

FOF/ COL #	Page	FOF/COL	Response
1 ¹	1	<p>THIS COURT VACATES THE CIRCUIT COURTS MAY 5TH, 2014 DECISION AND ORDER AFFIRMING BOARD OF LAND AND NATURAL RESOURCES, STATE OF HAWAII'S FINDING OF FACT AND CONCLUSIONS OF LAW AND DECISION AND ORDER GRANTING CONSERVATION DISTRICT USE PERMIT FOR THE THIRTY METER TELESCOPE AT THE MAUNA KEA SCIENCE RESERVE DATED APRIL 12, 2013, AND FINAL JUDGEMENT THEREON.</p> <p>THIS MATTER IS REMANDED TO THE CIRCUIT COURT TO FURTHER REMAND TO BLNR FOR PROCEEDING CONSISTANT WITH THIS OPINION, SO THAT A CONTESTED CASE CAN BE CONDUCTED BEFORE THE BOARD, OR A NEW HEARINGS OFFICER, OR FOR OTHER PROCEEDING CONSISTANT WITH THIS OPINION.</p>	<p>Incomplete. The proposed finding lacks proper citation to <u>Mauna Kea Anaina Hou v. Board of Land and Natural Resources</u>, 136 Hawaii 376, 399, 363 P.3d 224, 247 (Hawaii 2015). See UH-TIO FOF No. 34.</p>
2	1	<p>Hawaii Administrative Rules Title 13 sets the rules for practice and procedure use by the Department of Land and Natural Resources. Chapter 5 is specific to Contested Cases.</p> <p>This all must be in compliance with Hawaii Revised Statutes Chapter 91 Administrative procedures.</p>	<p>Incomplete. Unsupported/Unsubstantiated. Lacks proper citation See UH-TIO COL Nos. 37 – 63 for overview of authority pertaining to procedure and evidentiary matters.</p>
3	1-2	Under HAR 13.5 there is <i>NO</i> place where intervention takes place. Rather	Incomplete.

¹ Inasmuch as H. Fergerstrom has not set forth numbered findings or conclusions and has submitted a number of different documents as part of his Findings of Fact, Conclusions of Law, Recommendation, we are responding to his statements in the order in which each paragraph or item is presented.

		<p>it shows that the way to become a party to a contested case, one has to be present at the public hearing held regarding the application for a permit. Any person may call for a contested case, but it has to be done before the close of the day of said hearing. The person(s) must followed up within ten days a written request. Once a contested case hearing is authorized, the candidates are informed of the hearing date noticed by certified mail. The hearings will held on the island of most impact. Hawaii Island is the home of Mauna Kea. The names of those claiming a right to contest are informed of public hearing where each potential contestant is vetted to insure that each has a standing different than that of the general public or that another's position is not substantively duplicative or already represented.</p>	<p>Unsupported/Unsubstantiated. Lacks proper citation. Inaccurate/False. The process used by this Hearing Officer to admit new parties to this contested case was authorized and consistent with the applicable Rules of Practice and Procedure. See HAR § 13-1-31(b): “The following persons or agencies shall be admitted as parties . . . All persons . . . who otherwise can demonstrate that they will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public . . .” See also UH-TIO COL Nos. 17-24 for summary of authority regarding standing.</p> <p>Estoppe/Improper Reconsideration. This issue was already ruled upon by the Hearing Officer in Minute Order No. 22 [Doc. 345].</p>
4	2	In this particular case, the applicant is the University of Hawaii on behalf of the Thirty Meter Telescope, a non-profit Corporation.	<p>Unsupported/Unsubstantiated. Inaccurate/False. See UH-TIO FOF Nos. 1 and 10.</p>
5	2	Because there is no place for interventions on contested cases the proper procedure that is would be consistent with the opinion of the Supreme Court is to have the applicant re apply so a public hearing could commence.	<p>Unsupported/Unsubstantiated. Inaccurate/False. The public hearing on this matter was held on December 2 and 3, 2010. See <u>Mauna Kea Anaina Hou</u>, 136 Hawaii at 381, 363 P.3d at 229. The Hawaii Supreme Court decision in <u>Mauna Kea Anaina Hou</u> remanded this matter “so that a contested case hearing can be conducted before the Board or a new hearing officer . . .” 136 Hawaii at 399,</p>

6	2-3	As a result of non compliance to the strict reading of the rules set out in Title 13 Chapter 5 we find ourselves back where we started with the cart before the horse following the same path that lead to the vacation permit that is on remand.	363 P.3d at 247 (emphasis added).
7	3	It is very important to revisit/ re-apply the application as the circumstances have changed dramatically since this application was first filed in 2010. The language of the Court clearly points out that the constitutionally protected rights of the Hawaiian as defined in Article XI.5 and Article XII section 7, of the Hawaii State Constitution must be complied with first before any other consideration are made.	Unsupported/Unsubstantiated. Mr. Fergerstrom cites to no evidence or legal authority requiring the resubmittal or reapplication of the CDDUA. There was no requirement. See e.g., UHH-TIO COL 420-426. Estoppel/Improper Reconsideration. This issue was already ruled upon by the Hearing Officer in Minute Order No. 22 [Doc. 345] at 3 ("There is also no legal basis to require UHH to resubmit its CDUP application.").
8	3	My position is, the rules regarding contested cases have not been adhered to and all other attempts to move this application forward WILL CONTINUE fail as a result. The rules on procedure are clear and self-explanatory; I have included them as part of my finding of fact. The conclusions are self-evident.	Unsupported/Unsubstantiated. Vague and Ambiguous. Not material.
9	3	It is my recommendation that we need to strictly follow the rules. By denying the application now insures compliance with the opinion of the Supreme Court and insures that others in the future know that THE CONSTITUTION, fairness and due process prevails in Hawaii	Unsupported/Unsubstantiated. Vague and Ambiguous. Not Material.

10	1 ²	HAR 13-5 is the guiding Rules for a contested case. It is very specific in the description for participation, how one gets considered as a party, how one must have a position that is different from the general public	Unsupported/Unsubstantiated. Incomplete. Vague and Ambiguous. Not Material. Lacks citation to relevant authority. For summary of procedural requirements pertaining to this matter, see UH-TIO COL Nos. 7-24 and 37 - 77.
11	2	<p>HRS Chapter 91-9 Sets the structure of any contested case.</p> <p>A) All parties shall be afforded an opportunity for hearing after reasonable notice.</p> <p>B) Notice shall include a statement of,</p> <ul style="list-style-type: none"> 1) Date, Time, Place, and nature of hearing; 2) The legal authority under which the hearing is to be held; 3) The particular sections of the statutes and rules involved; 4) An explicit statement in plain language of the issues involved; 5) Fact that any party may retain counsel. <p>C) Opportunities shall afford all parties to present evidence and argument on all issues involved.</p> <p>Any procedure in a contested case may be modified or waived by stipulation of the parties.</p>	<p>Misleading. Partial quotation. Complete excerpt states:</p> <p>Contested cases; notice; hearing; records.</p> <p>(a) Subject to section 91-8.5, in any contested case, all parties shall be afforded an opportunity for hearing after reasonable notice.</p> <p>(b) The notice shall include a statement of:</p> <ul style="list-style-type: none"> (1) The date, time, place, and nature of hearing; (2) The legal authority under which the hearing is to be held; (3) The particular sections of the statutes and rules involved; (4) An explicit statement in plain language of the issues involved and the facts alleged by the agency in support thereof; provided that if the agency is unable to state such issues and facts in detail at the time the notice is served, the

² Page 1 of document entitled Remand Down for a Contested Case, or Other Proceedings Consistant.

		<p>initial notice may be limited to a statement of the issues involved, and thereafter upon application a bill of particulars shall be furnished;</p> <p>(5) The fact that any party may retain counsel if the party so desires and the fact that an individual may appear on the individual's own behalf, or a member of a partnership may represent the partnership, or an officer or authorized employee of a corporation or trust or association may represent the corporation, trust, or association.</p> <p>(c) Opportunities shall be afforded all parties to present evidence and argument on all issues involved.</p> <p>(d) Any procedure in a contested case may be modified or waived by stipulation of the parties and informal disposition may be made of any contested case by stipulation, agreed settlement, consent order, or default.</p>	Haw. Rev. Stat. § 91-9.
12	1	<p>HRS 91-9.5 Notification of hearing, service.</p> <p>A) Unless otherwise provided by law, ALL parties shall be given written notice of hearings by registered or certified mail with return receipt requested at least 15 days before hearing.</p>	<p>Inaccurate/False. Quotation is incorrect as highlighted. Correct excerpt states:</p> <p>Notification of hearing; service.</p> <p>(a) Unless otherwise provided by law, all parties shall be given written notice of hearing by registered or certified mail with</p>

		return receipt requested at least fifteen days before the hearing.
Haw. Rev. Stat. § 91-9.5.	Misleading. Incomplete quote. Complete statutory excerpt states:	Rules of evidence; official notice. In contested cases: (1) Except as provided in section 91-8.5, any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of <i>irrelevant, immaterial, or unduly repetitious evidence</i> . (2) Except as provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be the preponderance of the evidence. (3) Every party shall have the right to
13 1-2	HRS 91-10 Rules of evidence, official notice. In contested cases: 1) any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of <i>irrelevant, immaterial, or unduly repetitious evidence</i> . ⑥ Except as provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be the preponderance of the evidence.	 (1) Except as provided in section 91-8.5, any oral or documentary evidence may be received, but every agency shall as a matter of policy provide for the exclusion of irrelevant, immaterial, or unduly repetitive evidence and no sanction shall be imposed or rule or order be issued except upon consideration of the whole record or such portions thereof as may be cited by any party and as supported by and in accordance with the reliable, probative, and substantial evidence. The agencies shall give effect to the rules of privilege recognized by law; (2) Documentary evidence may be received in the form of copies or excerpts, if the original is not readily available; provided that upon request parties shall be given an opportunity to compare the copy with the original; (3) Every party shall have the right to

		<p>conduct such cross-examination as may be required for a full and true disclosure of the facts, and shall have the right to submit rebuttal evidence;</p> <p>(4) Agencies may take notice of judicially recognizable facts. In addition, they may take notice of generally recognized technical or scientific facts within their specialized knowledge; but parties shall be notified either before or during the hearing, or by reference in preliminary reports or otherwise, of the material so noticed, and they shall be afforded an opportunity to contest the facts so noticed; and</p> <p>(5) Except as otherwise provided by law, the party initiating the proceeding shall have the burden of proof, including the burden of producing evidence as well as the burden of persuasion. The degree or quantum of proof shall be a preponderance of the evidence.</p>	<p>Haw. Rev. Stat. § 91-10.</p> <p>Inaccurate/False. Quotation is incorrect in several instances as highlighted. Correct quotation is as follows:</p> <p>Examination of evidence by agency. Whenever in a contested case the officials of the agency who are to render</p>
14	2	<p>HRS 91-11 Examination of evidence by agency.</p> <p>Whenever in a contested case the officials of the agency who are to render the final decision have not heard and examined all of the evidence, decision, if adverse to a party to the proceedings other than the agency itself, should not be made until a proposal for decision containing a statement of reasons includings of each issue of fact or law necessary to</p>	

		<p>the proposed decision has been served upon the parties, and opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials work to render decisions, who shall personally consider the whole record or such portions thereof as may be cited by the parties.</p>	<p>the final decision have not heard and examined all of the evidence, the decision, if adverse to a party to the proceeding other than the agency itself, shall not be made until a proposal for decision containing a statement of reasons and including a determination of each issue of fact or law necessary to the proposed decision has been served upon the parties, and an opportunity has been afforded to each party adversely affected to file exceptions and present argument to the officials who are to render the decision, who shall personally consider the whole record or such portions thereof as may be cited by the parties.</p>	Haw. Rev. Stat. § 91-11.
15	2	<p>HRS 91-12 Decisions and orders.</p> <p>Every decision and order adverse to a party to the proceedings, rendered by an agency and a contested case, shall be in writing in the record shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceedings as filed proposed findings of fact, the agency shall incorporate and it's decision I really upon each propose finding so present. The agency shall notify the parties to the proceedings by delivering or mailing a certified copy of the decision order and accompanying findings of findings and conclusions with a reasonable time each party or to a party's attorney of record.</p>	<p>Inaccurate/False. Quotation is incorrect in several instances as highlighted herein. Correct quotation is as follows:</p> <p>Decisions and orders. Every decision and order adverse to a party to the proceeding, rendered by an agency in a contested case, shall be in writing or stated in the record and shall be accompanied by separate findings of fact and conclusions of law. If any party to the proceeding has filed proposed findings of fact, the agency shall incorporate in its decision a ruling upon each proposed finding so presented. The agency shall notify the parties to the proceeding by delivering or mailing a certified copy of the decision and order and</p>	

			accompanying findings and conclusions within a reasonable time to each party or to the party's attorney of record.
16	3	HAR 13-1-13.1 Service a) Service of documents may be made by mail, personal delivery, or facsimile transmission.	Not in dispute.
17	3	HAR 13-1-13.2 Additional time at service by mail. Whenever person has a right or is required to do some back within a prescribed period after the service of the document upon the person and the document is served by mail, two days shall be added to the prescribe period.	Inaccurate/False. Quotation is incorrect, as highlighted. Correct quotation is as follows: Additional time after service by mail. Whenever a person has the right or is required to do some act within a prescribed period after the service of a document upon the person and the document is served by mail, two days shall be added to the 1-14 prescribed period.
18	3	HAR 13-1-18 Counsel for the board and contest cases. A deputy attorney general, as assigned by the Department of the Atty. Gen., Will serve as consul to the board during its proceedings. A contested cases concerning alleged violations of law, there will be at least two deputy Attorney General's assigned by and from different divisions of the Department of the Attorney General, one to serve the department of land and natural resources in enforcement of the law and one to serve as a consul for the board.	Haw. Admin. R. § 13-1-13.2. Inaccurate/False. Quotation is incorrect, as highlighted. Correct quotation is as follows: Counsel for the board in contested cases. A deputy attorney general, as assigned by the department of the attorney general, will serve as counsel to the board during its proceedings. In contested cases concerning alleged violations of law, there will be at least two deputy attorneys general assigned by and from different divisions of the department of the attorney general, one to represent the department of land and

			natural resources in enforcement of the law and one to serve as counsel for the board.
19	3	HAR 13-1-19 Substitution of parties. Upon motion and for good cause shown the board may order substitution of parties; provided that in case of the death of a party, substitution may be ordered without the filing of a motion.	Haw. Admin. R. § 13-1-18. Irrelevant/Inapplicable.
20	4	HAR 13-1-28 Contested case hearings. a) What is required by law, the board shall hold a contest case hearing up on its own motion or on a written petition of any government agency or any interested party. b) The contested case hearing shall be held after any public hearing which by law required to be held on the same subject matter. Any procedure in a contested case may be modified or waived by stipulation of the parties.	Inaccurate/False. Quotation is incorrect, as highlighted. Correct quotation is as follows: Contested case hearings. (a) When required by law, the board shall hold a contested case hearing upon its own motion or on a written petition of any government agency or any interested person. (b) The contested case hearing shall be held after any public hearing which by law is required to be held on the same subject matter. (c) Any procedure in a contested case may be modified or waived by stipulation of the parties. Haw. Admin. R. 13-1-28.
21	5	HAR 13-1-29 Request for a hearing. On its own motion, the board may hold the contested case hearing. Others must both request a contested case and petition the board to hold contested case hearing. An oral or request for a contested case hearing the estimate to the board no later than the close of the board meeting. An agency or person also requesting a contested case plus also file or mail a postmarked written petition with the board for the contested case no longer than 10 calendar	Inaccurate/False. Incomplete. Quotation is incorrect, as highlighted. Correct quotation is as follows: Request for hearing. (a) On its own motion, the board may hold a contested case hearing. Others must both request a

		contested case and petition the board to hold a contested case hearing. An oral or written request for a contested case hearing must be made to the board no later than the close of the board meeting at which the subject matter of the request is scheduled for board disposition. An agency or person so requesting a contested case must also file (or mail a postmarked) written petition with the board for a contested case no later than ten calendar days after the close of the board meeting at which the matter was scheduled for disposition. For good cause, the time for making the oral or written request or submitting a written petition or both may be waived.
22	5-7	<p>HAR 13-1-31 Parties</p> <p>a) Party to a contested case to be determined within the reasonable time following the 10 day period following the board meeting, the presiding officer shall notify all persons and agencies who timely petitioned for the of contested case hearing of the date and time for the hearing to be to determine whether any or all persons or agencies seeking to participate in the contested case hearing are entitled to be parties in the contested case. Such notice shall also set the time for filing any objections to submission of any request you as a party to the contested case.</p> <p>b) The following persons or agencies shall be admitted a parties:</p> <ol style="list-style-type: none"> 1) all government agencies whose jurisdiction include the land in question Shall be admitted as parties upon timely application. 2) All persons who have some property interest in the land,

		<p>who lawfully reside on the land, who are adjacent property owners or who otherwise can demonstrate that they will be directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application.</p> <p>c) Other persons who can show a substantial interest in the matter may be admitted as parties. The board may approve such requests if it finds that the requestor's participation will substantially assist the board in its decision making. The board may deny any request to be a part when it appears that:</p> <ul style="list-style-type: none"> The position of the requestor is substantially the same as the position of a party already admitted to the proceedings; and (1) The admission of additional parties will not add substantially new relevant information or the addition will make the proceedings inefficient and unmanageable. <p>d) All persons with similar interests seeking to be admitted as parties shall be considered at the same time so far as possible.</p>	<p>entitled to be parties in the contested case. Such notice shall also set the time for filing any objections to the admission of any requestor as a party to the contested case. Without a hearing, an applicant or an alleged violator shall be a party.</p> <p>(b) The following persons or agencies shall be admitted as parties: (1) All government agencies whose jurisdiction includes the land in question shall be admitted as parties upon timely application. (2) All persons who have some property interest in the land, who lawfully reside on the land, who are adjacent property owners, or who otherwise can demonstrate that they will be so directly and immediately affected by the requested action that their interest in the proceeding is clearly distinguishable from that of the general public shall be admitted as parties upon timely application.</p> <p>(c) Other persons who can show a substantial interest in the matter may be admitted as parties. The board may approve such requests if it finds that the requestor's participation will substantially assist the board in its decision making. The board may deny any request to be a party when it appears that: (1) The position of the requestor is substantially the same as the position of a party already admitted to the proceedings; and (2) The proceedings; 1-26 and (2) The</p>
--	--	--	---

	<p>requestor's witness; provided, however, that the board or presiding officer or hearing officer may cross-examine any witness at such hearing. The hearing to determine parties may be waived upon concurrence of the applicant and all requestors.</p> <p>(g) If the hearing to determine parties to the contested case was not conducted by the board, and the person who conducted such hearing recommends that any agency or person requesting to be a party should not be allowed to participate in the contested case, such recommendation and the reasons therefor shall be immediately submitted to the board in writing. The requestor who request is recommended for denial shall have the opportunity to file objections to the recommendation. Such recommendation shall be acted upon by the board as soon as practicable and shall be commencement of the contested case hearing.</p>	<p>admission of additional parties will not add substantially new relevant information or the addition will make the proceedings inefficient and unmanageable.</p> <p>(d) All persons with similar interests seeking to be admitted as parties shall be considered at the same time so far as possible.</p> <p>(e) If any party opposes another person's request to be a party, the party may file objections within the time set forth by the presiding officer.</p> <p>(f) The hearing to determine parties to the contested case may be conducted by the board or the presiding officer, or by a hearing officer appointed by the board. At such hearing, evidence and argument shall be limited to matters necessary to determine whether the requestor shall be admitted as a party. Only a party objecting to a requestor's admission as a party shall have the opportunity to cross-examine a requestor or the requestor's witness; provided, however, that the board or presiding officer or hearing officer may cross-examine any witness at such hearing. The hearing to determine parties may be waived upon concurrence of the applicant and all requestors.</p> <p>(g) If the hearing to determine parties to the contested case was not conducted by the board, and the person who conducted such hearing recommends that any agency or person requesting to be a party should not be allowed to participate in the contested case, such recommendation and the reasons therefor shall be immediately submitted to the board in writing. The requestor whose request is recommended for denial shall have the opportunity to file objections to the recommendation. Such recommendation shall be acted upon by the board as soon as practicable and shall be decided, by written order, not later than the commencement of the contested case hearing.</p> <p>(h) A person whose request to be admitted as a party has been denied by the board may appeal that denial to the circuit court pursuant to section 91-14, HRS.</p>
--	---	---

		<p>(g) If the hearing to determine parties to the contested case was not conducted by the board, and the person who conducted such hearing recommends that any agency or person requesting to be a party should not be allowed to participate in the contested case, such recommendation and the reasons therefor shall be immediately submitted to the board in writing. The requestor whose request is recommended for denial shall have the opportunity to file objections to the recommendation. Such recommendation shall be acted upon by the board as soon as practicable and shall be decided, by written order, not later than the commencement of the contested case hearing.</p> <p>(h) A person whose request to be admitted as a party has been denied by the board may appeal that denial to the circuit court pursuant to section 91-14, HRS.</p>	Haw. Admin. R. § 13-1-31.
1	¹ ³	<p>Thirty Meter Telescope International Observatories has been allowed to be a party without any standing that is different or unrepresented by the University of Hawaii on behalf of Thirty Meter Telescope Corporation Represented by CARL SMITH BALL LLP, Timothy Lui Kwan, Ian Sandison</p>	<p>Unsupported/Unsubstantiated. See UH-TIO COL No. 24. The Hearing Officer granted TIO's motion to intervene as a party in this CCH under HAR § 13-1-31(c) due to "TIO's substantial interest in the subject matter and because TIO's participation will substantially assist the</p>

³ From document entitled Results of Administrative Bias and Non-Compliance with HAR 13.5.

		Hearing Officer in her decision making.” Minute Order No. 13 [Doc. 115] at 3-4. TIO has a substantial interest in the subject matter and its participation in this CCH did substantially assist the Hearing Officer in her decision making.
2	Thirty Meter Telescope International Observatories is not named on the Conservation District Use application and no attempt has been made to Accurately preface the application	Unsupported/Unsubstantiated. Irrelevant/Inapplicable. See UHH-TIO COL 420-426.
3	Thirty Meter Telescope International Observatories is represented by Watanabe Ing LLP ...with two new attorneys Douglas Ing and Ross Shinyama	Incomplete. See UH-TIO FOF No. 10.
4	The Attorney General's office is represented by Julie China, William Wyrhoff both of which has previously advocated in court for the applicant The University of Hawaii on behalf of TMT Corporation.	Unsupported/Unsubstantiated. Inaccurate/False. Vague and Ambiguous. Not Material.
5	Perpetuating Unique Educational Opportunities (PUEO) has been admitted as a party having absolutely no standing what so ever that is different than the General Public	Unsupported/Unsubstantiated. The Hearing Officer granted PUEO's motion to intervene as a party in this CCH under HAR § 13-1-31(c), finding that “PUEO’s participation will substantially assist the Hearing Officer in her decision making.” Minute Order No. 13 [Doc. 115] at 3-4. PUEO's participation in this CCH did substantially assist the Hearing Officer in her decision making.
6	Perpetuating Unique Educational Opportunities (PUEO) is represented by Lincoln Ashida of who also teaches at the University of Hawaii at Hilo	Irrelevant/Inapplicable to the extent it refers to Lincoln Ashida teaching at the University of Hawaii at Hilo. Incomplete. See UH-TIO FOF No. 11.

BOARD OF LAND AND NATURAL RESOURCES
FOR THE STATE OF HAWAI'I

IN THE MATTER OF

A Contested Case Hearing Re Conservation District Use Permit (CDUP) HA-3568 for the Thirty Meter Telescope at the Mauna Kea Science Reserve, Kaohe Mauka, Hamakua District, Island of Hawaii, TMK (3) 4-4-015:009

Case No. BLNR-CC-16-002

CERTIFICATE OF SERVICE

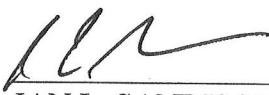
CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was served upon the following parties by the means indicated:

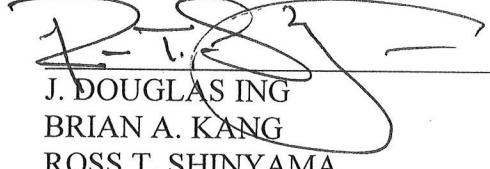
Michael Cain Office of Conservation and Coastal Lands 1151 Punchbowl, Room 131 Honolulu, HI 96813 <i>michael.cain@hawaii.gov</i> <i>Custodian of the Records</i> <i>(ORIGINAL + DIGITAL COPY)</i>	Office of Conservation and Coastal Lands dlnr.maunakea@hawaii.gov	Mehana Kihoi PO Box 393 Honaunau, HI 96726 <i>uhiwai@live.com</i>
Carlsmith Ball LLP Ian Sandison, Tim Lui-Kwan, John P. Manaut, Lindsay N. McAneeley 1001 Bishop Street ASB Tower, Suite 2200 Honolulu, HI 96813 <i>isandison@carlsmith.com</i> <i>tluikwan@carlsmith.com</i> <i>jpm@carlsmith.com</i> <i>lmcaneeley@carlsmith.com</i> <i>Counsel for the Applicant University of Hawai'i at Hilo</i>	J. Leina'ala Sleightholm P.O. Box 383035 Waikoloa, HI 96738 <i>leinaala.mauna@gmail.com</i>	C. M. Kaho'okahi Kanuha 77-6504 Maile St Kailua Kona, HI 96740 <i>Kahookahi.kukiaimauna@gmail.com</i>
Torkildson, Katz, Moore, Hetherington & Harris Attn: Lincoln S. T. Ashida 120 Pauahi Street, Suite 312 Hilo, HI 96720-3084 <i>lsa@torkildson.com</i> <i>njc@torkildson.com</i> <i>Counsel for Perpetuating Unique Educational Opportunities (PUEO)</i>	Lanny Alan Sinkin P. O. Box 944 Hilo, HI 96721 <i>lanny.sinkin@gmail.com</i> <i>Representative for The Temple of Lono</i>	Maelani Lee PO Box 1054 Waianae, HI 96792 <i>maelanilee@yahoo.com</i>
	Harry Fergerstrom P.O. Box 951 Kurtistown, HI 96760 <i>hankhawaiian@yahoo.com</i> <i>(via email & U.S. mail)</i>	Kalikolehua Kanaele 4 Spring Street Hilo, HI 96720 <i>akulele@yahoo.com</i>
	Dwight J. Vicente 2608 Ainaola Drive Hilo, Hawaiian Kingdom <i>dwightjvicente@gmail.com</i> <i>(via email & U.S. mail)</i>	Stephanie-Malia:Tabbada P O Box 194, Naalehu, HI 96772 <i>s.tabbada@hawaiiantel.net</i>
	Brannon Kamahana Kealoha 89-564 Mokiawe Street Nanakuli, HI 96792 <i>brannonk@hawaii.edu</i>	Joseph Kualii Lindsey Camara <i>kualiic@hotmail.com</i>

William Freitas PO Box 4650 Kailua Kona, HI 96745 pohaku7@yahoo.com	Cindy Freitas PO Box 4650 Kailua Kona, HI 96745 hanahanai@hawaii.rr.com	Wilma H. Holi P.O. Box 368 Hanapepe, HI 96716 <i>Witness for the Hearing Officer</i> w_holi@hotmail.com
Flores-Case 'Ohana E. Kalani Flores ekflores@hawaiiantel.net	Glen Kila 89-530 Mokiawe Street Waianae, HI 96792 makakila@gmail.com	Ivy McIntosh 67-1236 Panale'a Street Kamuela, Hawaii 96743 3popoki@gmail.com <i>Witness for the Hearing Officer</i>
Tiffnie Kakalia 549 E. Kahaopea St. Hilo, HI 96720 tiffniekakalia@gmail.com	B. Pualani Case puacase@hawaiiantel.net	Moses Kealamakia Jr. 1059 Puku Street Hilo, Hawaii 96720 mkealama@yahoo.com <i>Witness for the Hearing Officer</i>
Paul K. Neves kealiikea@yahoo.com	Clarence Kukauakahi Ching kahiwaL@cs.com	Crystal F. West P.O. Box 193 Kapaau, Hawaii 96755 crystalinx@yahoo.com
Kealoha Pisciotta and Mauna Kea Anaina Hou keomaivg@gmail.com	Yuklin Aluli, Esq. 415-C Uluniu Street Kailua, Hawaii 96734 yuklin@kailualaw.com Co-Counsel for Petitioner KAHEA: The Hawaiian Environmental Alliance, a domestic non-profit Corporation	Dexter K. Kaiama, Esq. 111 Hekili Street, #A1607 Kailua, Hawaii 96734 cdexk@hotmail.com Co-Counsel for Petitioner KAHEA: The Hawaiian Environmental Alliance, a domestic non-profit Corporation
Deborah J. Ward cordylinecolor@gmail.com		

DATED: Honolulu, Hawai'i, June 13, 2017.



IAN L. SANDISON
JOHN P. MANAUT
LINDSAY N. MCANEELEY
Attorneys for Applicant UNIVERSITY OF
HAWAI'I AT HILO



J. DOUGLAS ING
BRIAN A. KANG
ROSS T. SHINYAMA
Attorneys for TMT INTERNATIONAL
OBSERVATORY LLC